United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7142

To be argued by
FLOYD ABRAMS

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ANTHONY HERBERT,
Plaintiff-Appellee,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,
Defendants,

BARRY LANDO, MIKE WALLACE AND CBS INC.,
Defendant-Appellants.

ON APPEAL, PURSUANT TO 28 U.S.C. § 1292(b), FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANTS BARRY LANDO, MIKE WALLACE AND CBS INC.

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BRIEF OF DEFENDANT-APPELLANTS BARRY LANDO, MIKE WALLACE AND CBS INC.

This is an appeal of Barry Lando, Mike Wallace and CBS Inc. ("CBS") from a Memorandum Opinion and Order entered on January 4, 1977 in the United States District Court for the Southern District of New York, Hon. Charles Haight, U.S.D.J. (JA 188a-230a)* In its opinion, the District Court considered what it recognized to be a question of "first impression"—the relationship in libel suits governed by *New York Times Co.* v. *Sullivan,* 376

* References to "JA " are to the Joint Appendix filed with this Court.

U.S. 254 (1964), of the First Amendment to demands for pre-trial discovery into the editorial decision-making process of the press. The District Court ruling rejected explicitly and totally the relevance of the asserted First Amendment protection and ordered a journalist to respond to a wide range of questions put to him at deposition relating to the editorial decision-making process of CBS in its preparation of a television documentary. On February 24, 1977, a second Memorandum and Order was entered by the District Court (JA 231a-39a) amending the Order of January 4, 1977 to conclude that the Order involved a controlling question of law as to which there was substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. On March 17, 1977 this Court granted the petition of Lando, Wallace and CBS, pursuant to 28 U.S.C. § 1292(b) (1970), for leave to take this interlocutory appeal.

Statement of Facts

Nature of the Action

This defamation action relates to a February 4, 1973 television network broadcast by CBS of the program "60 MINUTES". The segment at issue was entitled "THE SELLING OF COLONEL HERBERT". The plaintiff is Anthony Herbert; the defendants are CBS and Messrs. Lando and Wallace, respectively, the individual producer of and correspondent for the segment.* The segment was

* A second claim is asserted by plaintiff which is not relevant to this appeal. It names Lando and the Atlantic Monthly Company (hereinafter "Atlantic") as defendants, alleging that plaintiff was libeled by the publication of an article written by Lando and published by Atlantic in its May, 1973 issue. The article was entitled "The Herbert Affair". It reports defendant Lando's investigation of the highly publicized controversy surrounding plaintiff's brief command and his relief from command in Vietnam.

principally devoted to an examination of the validity of Herbert's allegations that the American military covered up war crimes in Vietnam, and, particularly, the claim that there was a cover-up of war crimes Herbert claimed he himself reported.

In their answers, petitioners Lando, Wallace and CBS raised several affirmative defenses. Included were the defenses that the broadcast constituted a fair and true report of public and official proceedings published in good faith without malice, and that the broadcast was protected by the First and Fourteenth Amendments to the United States Constitution. (JA 77a-113a) There is no dispute that plaintiff is a public figure or public official—or both—and that the case is therefore governed by principles set forth in *New York Times Co.* v. *Sullivan, supra,* and its progeny.

By agreement of counsel, plaintiff was permitted to begin and complete discovery of defendants Lando, Wallace and CBS before the commencement of defendants' discovery of plaintiff. Plaintiff's discovery began with the production of thousands of pages of documents by the defendants; plaintiff also attended screenings of the segment and of filmed interviews with respect thereto.

The Lando Deposition

Plaintiff's deposition of defendant Lando began on August 1, 1974 and was concluded on September 26, 1975, subject to a ruling by the Court on disputed areas. There have been twenty-six sessions resulting in 2903 pages of transcript and 240 exhibits.* In the course of the Lando

* There have also been depositions of CBS by examination of William Leonard, who at the time of the broadcast was Senior Vice-President, CBS News, and by examination of Don Hewitt, Executive Producer of "60 MINUTES". The deposition of defendant

deposition, plaintiff has extensively inquired about what Lando knew, or had seen; whom Lando interviewed; Lando's discussions with interviewees; and the form and frequency of his communications with his sources. All such questions have been answered. There has also been complete pre-broadcast discovery as to conversations between Lando and Wallace concerning factual information gathered by Lando and imparted to Wallace. And there have been questions and answers relating to documents shown to Wallace by Lando and questions and answers concerning conversations about those documents.

The questions to which objections were raised and which became the subject of plaintiff's Rule 37 motion relate, in the main, to matters which did not even appear in the broadcast. They involve Lando's beliefs, opinions, intent and conclusions; they range from questions designed to elicit "Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued . . ." to other questions which inquire into "Lando's intentions as manifested by the decision to include or exclude material". (JA 193a)

Illustrative questions include the following:

—whether Lando had "considered making a comment" in the broadcast "about the Army or Pentagon representatives going to military installations to speak against Col. Herbert" (p. 523);*

—whether Lando had at any time proposed to include in the broadcast "a reference" to the Pentagon rep-

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Wallace began on April 1, 1976 and was continued for two additional days, concluding on April 8, 1976, subject to the review of open areas by the District Court. The Lando, Wallace, Leonard and Hewitt depositions are all being filed, in their entirety, as part of the Supplemental Record on Appeal.

* References to "p. " are to pages of the Lando deposition.

resentatives who had spoken at Army bases with respect to Col. Herbert (p. 524);

—whether Lando had spoken to Wallace "about including in the program a comment" to the effect that a statement made by one soldier had allegedly not been "confirmed" by other soldiers (p. 586);

—whether Lando "ever came to a conclusion" that it was unnecessary "to interview one individual" (p. 666);

—what "the basis" was for Lando's decision to interview one soldier three times and not to interview another soldier (p. 667);

—what "the basis" was for including in the broadcast a statement by one individual and not another regarding Col. Herbert's treatment of Vietnamese (p. 876);

—whether Lando had "propose[d] to include in the program" certain favorable statements about Col. Herbert (p. 877);

—and a wide variety of other questions relating to the editorial selection process by which CBS and its employees determined what to include in the "60 MINUTES" segment relating to Colonel Herbert.

When Mr. Lando, on advice of counsel, declined to respond to these and related questions, plaintiff sought an order compelling discovery pursuant to Rule 37(a)(2), Fed.R. Civ.P.

The District Court Opinion

On January 4, 1977, Judge Haight entered his Memorandum and Order directing defendants to respond to es-

sentially all the disputed discovery sought by plaintiff. (JA 188a-230a)* After observing that the case was "one of first impression", the Court concluded that given the "already heavy burden of proof" upon a public figure plaintiff in a *Sullivan*—governed libel suit, such a plaintiff is entitled to "liberal interpretation" of pre-trial discovery rules. (JA 189a, 199a) Such an interpretation, the Court concluded—citing a ruling of Judge Lumbard in which First Amendment considerations were not even present**—would permit discovery of "'almost anything that will help the examining party to discover any leads to evidence.'" (JA 199a-200a)

Much reliance was placed by the District Court in its opinion upon this Court's ruling in *Goldwater* v. *Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). Based upon *Goldwater*, Herbert was held entitled to "full discovery" on such issues as, for example, "whether Lando's investigation and research was negligent" and whether Lando "had any reason . . . to prefer the veracity of one source over another." The thrust of the Court's opinion as to these matters was summarized by it (in its certification ruling of February 24, 1977) as follows:

> ". . . if 'reckless disregard for truth' is a basis for liability, it necessarily follows that a plaintiff is entitled to discovery of the selective aspects of the editorial process; otherwise, he would never be able to

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* On July 21, 1976, the Court had entered a similar order permitting plaintiff to inquire into the general subject of the procedures followed by CBS in producing segments of "60 MINUTES" and into the expenses incurred by reporters and those working under them on the Herbert segment. (JA 140a-76a) Such rulings are also at issue on the instant appeal. *See, e.g., Wolston* v. *Reader's Digest*, 2 Media L.Rptr. 1289, 1298 (D.D.C. 1977).

** *United States* v. *Matles*, 247 F.2d 378, 383 (2d Cir. 1957), *rev'd on other grounds*, 356 U.S. 256 (1958).

prove (a) whether there has been 'disregard' of available and accurate source material; and (b) whether such 'disregard' could properly be characterized as 'reckless'." (JA 235a)

All claims of First Amendment protection—or even the relevance of First Amendment considerations—were summarily rejected by the District Court. Cases cited by CBS including *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), and *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), were distinguished on their facts and rejected insofar as they were urged to set forth relevant bodies of law: "[t]hese cases", the Court concluded, "have *nothing to do* with the proper bounds of pre-trial discovery in a defamation suit alleging malicious prosecution." (Emphasis added) (JA 203a-04a) It is precisely that conclusion of the District Court which is at the heart of this appeal.

Question Presented

What effect should be given to the First Amendment protection of the press with respect to its exercise of editorial judgment in pre-trial discovery in a libel case governed by *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964)?

ARGUMENT

Introduction: The Scope of the Appeal

It may be well to clarify, at the outset, three matters relating to the nature and scope of this appeal. The first is that by this appeal appellants do not ask this Court to review the discovery rulings of the District Court as to each specific question in dispute. The District Court, in

its opinion, enunciated a broad rule of law rejecting the applicability of First Amendment considerations to the entire question of the scope of discovery as to editorial decision-making in the context of a *Sullivan* libel suit; it ruled that such First Amendment considerations had and should have "nothing to do" with the ruling of a District Court on such a motion. We believe this view was wrong—dangerously so—and it is a challenge to this ruling which is presented to this Court by the present appeal. What appellants seek by the appeal is a ruling remanding the case to the District Court, with instructions for that Court to redetermine the issues raised by the motions, giving due regard to First Amendment considerations as set forth by this Court.

The second matter is closely related to the first: whatever rule of law is adopted by this Court is likely to be of far more than usual precedential effect. This is true for a number of reasons: the unusual circumstance of an interlocutory appeal being heard; the rarity of Supreme Court review of such an appeal; the high regard with which this Court has historically been viewed by other courts around the nation; the prohibitive cost to many newspapers or broadcasters of taking such an appeal or otherwise testing the ruling of a district judge in this field;* and—certainly not least—the extraordinary breadth

* As one eminent professor of journalism has observed, "even the most determined opponents of government are going to give more careful consideration in the future to any major confrontations on the issues that have gone before the Supreme Court . . . [because] they are, as a rule, too expensive for all save the wealthiest and most important papers". Hohenberg, *Free Press, Free People* 509 (1973) Similarly, in Justice Brennan's concurring opinion in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 611n (1976), he quoted from an apposite letter from the editor and publisher of the Anniston (Alabama) *Star*, as follows:

> "Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The

of the District Court's opinion. Undoubtedly the precedent established by the District Court opinion would, if affirmed, govern cases far different on their facts from this one. The ruling that a a matter of law in *Sullivan* cases "liberal" discovery must be allowed and that non-libel First Amendment cases have "nothing to do" with such cases is sweeping in its scope; it is, as well, equally applicable to suits by powerful public officials against small newspapers as it is to the parties in this case. Under the District Court's ruling, such officials are now apparently to be permitted to inquire into why, for example, certain information about them rather than other information was published and why more favorable information about them was *not* printed. Entirely apart from what we believe to be the decision's unprecedented error in so ruling, there can be little doubt that any such rule of law would be of the most far-reaching import.

Finally, we emphasize at the outset our agreement with the District Court that this case does, indeed, raise a question of first impression. Since no case is directly on point, we have organized this brief in three sections. First,

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causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided."

We believe this language illustrates the appropriateness of consideration on this appeal of the effect of the District Court's ruling on the many broadcasters and print journalists who will be unable to challenge discovery rulings of dubious constitutionality—or even all-but-certain unconstitutionality—through the appellate process.

we demonstrate that First Amendment protection for "editorial process" decisions of the print or broadcast press is sweeping in its nature (pp. 10-14); then we discuss those cases indicating the extremely high degree of judicial sensitivity to any requirements—including compulsory disclosure—that might inhibit the full and free exercise of First Amendment rights (pp. 14-21); we then conclude with our discussion of the nature of the error of the District Court (pp. 21-32).

1. The First Amendment Protection of "Editorial Process" Decisions of the Press

The questions at issue before the District Court related to what Judge Haight characterized as "selective aspects of the editorial process". (JA 235a) We start with the proposition that the full and untrammelled functioning of precisely that "process" has received First Amendment protection at least as sweeping and broadly encompassing as any other that has yet been provided.

The leading case is undoubtedly the unanimous ruling of the United States Supreme Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). *Tornillo* involved a Florida statute creating a "right of reply" to press criticism of a candidate for nomination and election. After the Florida Supreme Court ruled the statute was constitutional, the Supreme Court reversed, notwithstanding arguments to the effect that: (a) the statute would foster the First Amendment value of diversified expression; (b) media concentration had frustrated the public's right to know about news—including news of the media itself; and (c) the statute would help to permit a better informed public to vote in the Florida elections. Despite all these arguments, the fact that what was at issue was a statute duly adopted by the Florida legislature, and the fact that the "access" movement had received significant

scholarly support*—the Supreme Court's reversal was unanimous.

The Court's *Tornillo* opinion was bottomed primarily on two factors. The first was that the statute might well inhibit speech, by leading editors to conclude that controversy should be avoided. The second—and more far-reaching—conclusion of the Court was this:

> "Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." (418 U.S. at 258)

Thus, the "exercise of editorial control and judgment" was held so protected by the First Amendment as to require reversal.

Tornillo followed closely after the Supreme Court's ruling in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 124-25 (1973),

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* A compilation of the literature is contained in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media,* 52 N.C.L.Rev. 1, 2 n.5 (1973).

the case holding that neither the Communications Act nor the First Amendment required broadcasters to accept paid editorial advertisements. In the course of his opinion in that case Chief Justice Burger stated:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but . . . [c]alculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; and authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression."

Justice Stewart, in a speech made ten months after *Tornillo* was decided, summarized the underlying nature of these and other recent rulings of the Supreme Court as follows:

> "It seems to me that the Court's approach to all these [the defamation, journalists' privilege, Pentagon Papers, and *Tornillo*] cases has uniformly reflected its understanding that the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.

"This basic understanding is essential, I think, to avoid an elementary error of constitutional law. It is tempting to suggest that freedom of the press means only that newspaper publishers are guaranteed freedom of expression. They *are* guaranteed that freedom, to be sure, but so are we all, because of the Free Speech Clause. If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy. . . .

"It is also a mistake to suppose that the only purpose of the constitutional guarantee of a free press is to insure that a newspaper will serve as a neutral forum for debate, a 'marketplace for ideas', a kind of Hyde Park corner for the community. A related theory sees the press as a neutral conduit of information between the people and their elected leaders. These theories, in my view, again give insufficient weight to the institutional autonomy of the press that it was the purpose of the Constitution to guarantee . . . .

"The primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." (Emphasis in original) (Stewart, *"Or of the Press"*, 26 Hastings L. J. 631, 633-34 (1975))

The very breadth and scope of *Tornillo* causes it to remain a controversial decision. One scholar has attacked it as being too "absolutist"—and thus inconsistent with "other rules grounded in the First Amendment." Schmidt, *Freedom of the Press vs. Public Access* 13 (1976); it has, as well, been defended as correctly reflecting the Supreme Court's conclusion in a variety of cases "that the degree of First Amendment protection afforded the press depends

upon the extent to which the alleged intrusion on press freedom impinges on the editorial decision-making process." Abrams, *In Defense of Tornillo,* Book Review, 86 Yale L.J. 361, 366-67 (1976). What is undisputed is that *Tornillo* and its forebears establish, in terms as absolute as *any* to come from the Supreme Court, that there is sweeping First Amendment protection for the press with respect to its "editorial process"—the same process into which the District Court's order would allow discovery as to " 'almost anything' ". (JA 200a)

2. The Risk of Inhibiting the Press by Requiring Disclosure, Pursuant To Court Order, of Its "Editorial Process" Decisions

Given the extraordinarily high degree of protection afforded by the First Amendment to the editorial decision-making process of the press, we turn to the question of the First Amendment implications of compulsory disclosure —pursuant to court order—of "selective aspects" of that process. (JA 235a) We wish to be explicit about the nature of those implications: it is the risk of inhibiting the press both in its news-gathering* and in its exercise of editorial judgment as to what to print.

The inhibitory potential of governmental scrutiny with respect to the editorial process of a journalist may be most evident in the context of a congressional investigation in which a journalist is asked precisely the questions put to Mr. Lando—how and why he printed or broadcast one story and not another.** It also may be evident in libel

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* News-gathering has long been held entitled to First Amendment protection. *See Branzburg* v. *Hayes,* 408 U.S. 665, 707 (1972).

** Daniel Schorr, for example, recently declined to respond to questions put to him by the House Standards of Conduct Committee relating to his personal editorial decisions with respect to

suits when a government official sues for libel and demands unrestricted discovery of those in the press who have incurred his displeasure.*

The potential for such inhibition is perhaps less evident, but no less real, when a public figure not holding government position sues, both because of the power often held by such an individual and because, in any event, the Court from which such plaintiff seeks aid in obtaining the journalists' testimony and documents is as surely "government" as is an investigating committee of the House of Representatives, the FBI or any investigatory agency. In this respect Chief Justice Burger's opinion in *Nebraska Press Ass'n* v. *Stuart, supra,* 427 U.S. at 560, takes pains to point to the special First Amendment vice of delays in publication "imposed by governmental authority"—the judiciary. And Justice Brennan's concurrence in the same case observed that "the decision of what, when, and how to publish is for editors, not judges." (*Id.* at 613) *See also Craig* v. *Harney,* 331 U.S. 367, 371 (1947).

While courts are thus surely "government", it is to the courts that those concerned about the possibility of "governmental" actions inhibiting them in their exercise

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publication of the Pike Committee Report on precisely the ground that "the internal process of preparing news for publication or for broadcast cannot be subjected to the compulsory process of subpoena without subverting the purposes of the First Amendment." *New York Times,* September 16, 1976, p. 69, col. 3. The Committee later declined to issue a contempt citation with respect to Mr. Schorr's unwillingness to divulge his confidential sources or to reveal such protected editorial matter. *New York Times,* September 23, 1976, p. 1, col. 4.

* A less hypothetical illustration may be seen in *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). Cervantes, then the mayor of St. Louis, was accused in a Life Magazine article of direct personal ties with notorious underworld figures.

of First Amendment rights necessarily come for protection. Such protection has clearly been recognized as required with respect to the functioning of government itself. The Supreme Court's "own conferences [and] the meetings of other official bodies gathered in executive session" are routinely closed to the press and public. *Branzburg* v. *Hayes*, 408 U.S. 665, 684 (1972); *City of Madison* v. *Wisconsin Employment Relations Commission*, 97 S.Ct. 421, 428 (1976) (Brennan, J., concurring). Even under the Freedom of Information Act "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempt from disclosure. 5 U.S.C. § 552(b)(5) This Court has stated that the purpose of the exemption is that of "encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349, 1358-59 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971); *see also, Montrose Chemical Corp.* v. *Train*, 491 F.2d 63, 70 (D.C. Cir. 1974) [the "purpose of exemption 5 is not simply to encourage frank intra-agency discussion of policy, but also to ensure that the mental processes of decision-makers are not subject to public scrutiny."]*

Given the degree of protection that has already been held legally required to protect against the possibility of chilling the government's internal deliberations, it is not surprising that the courts have been particularly sensitive

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* *See also, inter alia, Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973). *Washington Research Project, Inc.* v. *Department of Health, Education & Welfare*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), *Brockway* v. *Department of Air Force*, 518 F.2d 1184 (8th Cir. 1975), and *Kent Corp.* v. *NLRB*, 530 F.2d 612 (5th Cir. 1976).

to any risk that governmental action itself might deter or inhibit others from the full exercise of their constitutional rights. *See, e.g. Elrod* v. *Burns,* 427 U.S. 347, 355-73 (1976) (practice of patronage dismissals by public official); *Buckley* v. *Valeo,* 424 U.S. 1, 12-59 (1976) (provisions in Federal Election Campaign Act limiting various campaign expenditures by or for candidates); *Kusper* v. *Pontikes,* 414 U.S. 51, 56-61 (1973) (prohibition against voting at primary if voter has voted at primary of another political party within specified period of time); *Healy* v. *James,* 408 U.S. 169, 181-84 (1972) (denial of request for official recognition without justification by state college of political campus organization); *Lamont* v. *Postmaster General,* 381 U.S. 301, 305-07 (1965) (statutory postal requirement obligating addressee to request in writing that "communist political propaganda" be delivered); *Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539, 534-50 (1963) (requirement that organization supply membership records); *NAACP* v. *Button,* 371 U.S. 415, 428-44 (1963) (inclusion of civil rights organization in Virginia statute prohibiting solicitation of legal business by certain specified parties); *Talley* v. *California,* 362 U.S. 60, 64-65 (1960) (requirement that names and addresses of sponsors be printed on handbills); *Bates* v. *City of Little Rock,* 361 U.S. 516, 523-27 (1960) (compulsory disclosure of membership lists). *See also Louisiana ex rel. Gremillion* v. *NAACP,* 366 U.S. 293, 296-97 (1961); *Shelton* v. *Tucker,* 364 U.S. 479, 484-90 (1960); *NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 460-66 (1958).

The language in many of these cases is suggestive of the fashion in which they were approached by the Supreme Court: in *Buckley,* for example, the Supreme Court concluded that exacting scrutiny must be provided by the

Courts to avoid a chilling effect "even if *any* deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . ." (Emphasis added; 424 U.S. at 65) In *Talley*, the requirement that the names and addresses of those who wrote and/or sponsored the distribution of handbills was held unconstitutional because it *"would tend to restrict* freedom to distribute information and thereby freedom of expression".* (Emphasis added; 362 U.S. at 64) And in *Lamont*, the Court in holding unconstitutional a postal requirement that those that wished to receive "communist political propaganda" had to explicitly request it of the Post Office expressed concern about the fact that "any addressee is *likely to feel some inhibition*" at doing so: such a requirement, the Court concluded, was "at war with the 'uninhibited, robust and wide-open' debate and

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*Many cases decided since *Talley* have held unconstitutional requirements of compulsory disclosure of the authors or distributors of various publications. *See, e.g., Opinion of the Justices*, 306 A.2d 18 (Me. 1973) [requirement that author of newspaper editorials be disclosed held unconstitutional]; *In re Opinion of the Justices*, 324 A.2d 211 (Del. 1974) [requirement that author of newspaper editorials be signed held unconstitutional]; *Wulp* v. *Corcoran*, 454 F.2d 826 (1st Cir. 1972) [ordinance requiring persons wishing to sell printed materials on street to obtain permit and a badge held unconstitutional]; *Bursey* v. *United States*, 466 F.2d 1059, 1088 (9th Cir. 1972) [grand jury investigating assassination threat against President held not entitled, in light of First Amendment, to require answers to questions as to "all persons who worked on the paper and the pamphlets, to describe each of their jobs, [and] to give the details of financing the newspaper. . . ."]; *Printing Industries of the Gulf Coast* v. *Hill*, 382 F.Supp. 801, 809 (S.D. Texas 1974), *vacated on grounds of amendment to legislation*, 422 U.S. 937 (1975) [election statute requiring identification of "printer or publisher" of political advertising held unconstitutional since printer "may decline to print matter submitted to him by dissident or unpopular groups for fear of official or unofficial reprisals. . . ."]

discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270." (Emphasis added; 381 U.S. at 307)

The reliance of the Supreme Court in *Lamont* upon *Sullivan* itself is revealing. It is precisely the same concern about the potential for inhibition of journalists and editors that has led the courts—notwithstanding the heavy burden on a public figure plaintiff in a libel suit—to make "summary judgment . . . the 'rule,' and not the exception, in defamation cases" and to conclude that a public figure plaintiff must "make a far more persuasive showing than required of an ordinary litigant in order to defeat a defense motion for summary judgment." * The rationale for such decisions is set forth in *Sullivan* itself:

> "[W]ould-be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." (376 U.S. at 279)

It is the same risk of inhibiting or "dampen[ing] the vigor" of the press that is threatened by permitting the type of pre-trial discovery held permissible by Judge Haight's ruling.

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* *Guitar* v. *Westinghouse Electric Corp.,* 396 F.Supp. 1042, 1053 (S.D.N.Y. 1975); *Grant* v. *Esquire, Inc.,* 367 F.Supp. 876, 881 (S.D.N.Y. 1973). The *Guitar* and *Grant* cases both contain lengthy summaries of summary judgment cases in the field. *See generally Buckley* v. *Littell,* 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 45 U.S.L.W. 3489 (U.S. January 17, 1977).

In a variety of other areas as well, the courts, in the interest of avoiding even the possibility of inhibiting protected speech, have taken the strongest steps to avoid such inhibitions. Statutes have thus been held unconstitutionally overbroad on the basis of the

> ". . . judgment of this [Supreme] Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes."

Broadrick v. *Oklahoma,* 413 U.S. 601, 612 (1973); *Gooding* v. *Wilson,* 405 U.S. 518, 521 (1972).

Similarly, vague statutes which even touch upon First Amendment freedoms have been held unconstitutional on the ground that such "freedoms are delicate and vulnerable, as well as supremely precious in our society", *NAACP* v. *Button,* 371 U.S. 415, 433 (1963), and that "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972).

All the First Amendment cases previously discussed in this section have in common the application of a legal test which, far from requiring certain proof that particular laws or compelled responses to inquiries will inhibit the exercise of First Amendment rights, strains to avoid even the possibility of any such inhibition. Hence, legal standards which would be unthinkable in other areas of law have been routinely applied: laws that "would tend to restrict freedom" are stricken (*Talley*); governmental practices that would "likely" make individuals "feel some inhibition" are stricken (*Lamont*); libel law itself is con-

stitutionalized so as to avoid "dampen[ing] the vigor" of debate (*Sullivan*); and statutes are stricken because speech "may be muted" (*Broadrick*) and because First Amendment rights are so "delicate and vulnerable" (*Button*).

From all of the above, we reach an *a fortiori* conclusion with respect to the protection of the editorial decision-making process of the press from compelled scrutiny. Given the high degree of First Amendment protection for the press with respect to its editorial decisions; given the fact that government itself needs—and receives—such protection to avoid inhibiting it in its work; given the fact that even the threat of muting the press or "dampening" its "vigor" has been held sufficient to require the imposition of significant limits on governmental action; and given the fact that the press, as Justice Stewart observed, is specially protected under the Constitution so that it may serve "as an additional check on the three official branches", the press is surely entitled to protection from having its editorial decisions publicly probed pursuant to court order, let alone one premised on the notion that questions may be asked about " 'almost anything' ".

3. The Pervasive Error of the District Court

The crux of the error of the District Court was this: it refused even to recognize that the discovery motion before it required more than the wooden application of Federal Rule 26 and that it involved the application of the First Amendment itself. In so viewing the motion before it, the District Court ignored the fact that the very process of litigation—and of too "liberal" discovery—can itself threaten First Amendment rights.* Other courts

* Even in a non-First Amendment context, the Supreme Court has recognized the immense potential for "possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975).

have better understood this threat, and acted accordingly.

For example, in *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board,* 542 F.2d 1076 (9th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3626 (U.S. March 21 1977), the Court affirmed the dismissal with prejudice of a complaint which challenged as violative of the antitrust laws activities which the Court concluded were at least *prima facie* entitled to First Amendment protection as exercises of the right to associate and petition one's government. In its recent opinion affirming the dismissal, the Court of Appeals for the Ninth Circuit observed that:

> "The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. See, e.g., Time, Inc. v. Hill, 1967, 385 U.S. 374, 387-91, 87 S.Ct. 534, 17 L.Ed.2d 456; New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 267-83, 84 S.Ct. 710, 11 L.Ed.2d 686; N.A.A.C.P. v. Button, 1963, 371 U.S. 415, 431-33, 83 S.Ct. 328, 9 L.Ed.2d 405. Because we think that similar values are endangered in this case, we hold that in order to state a claim for relief under the Trucking Unlimited exception, a complaint must include allegations of the specific activities, not protected by Noerr, which plaintiffs contend have barred their access to a governmental body. . . .
>
> "In holding that plaintiffs' allegations are insufficient in this case, we are not adopting a rule that so-called 'fact' pleading, as distinguished from 'notice' pleading, is required in antitrust cases. We repudiated that notion in Walker Distributing Co. v. Lucky Lager Brewing Co., 9 Cir., 1963, 323 F.2d 1, 3-4. What we do hold is that in any case, whether antitrust or something else, where a plaintiff seeks

> damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.
>
> * * *
>
> "The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case." (542 F.2d at 1082-83)

On the instant appeal what is involved is, if anything, far more threatening than just the financial burden of frivolous lawsuits: it is the risk that the discovery process itself—quite without regard to the underlying merits of the litigation—may become a source of substantial inhibition to the press.

This Court itself has, in analogous circumstances, been far more accommodating to the First Amendment interests than was the District Court. In its landmark ruling in *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), this Court rejected an argument which would have required disclosure by journalists of their confidential sources in all federal question cases or, at least, all federal civil rights cases. In a ruling which took account both of the needs of the party seeking discovery in a civil case and "the preferred position which the First Amendment occupies in the pantheon of freedoms" (470 F.2d at 783), the Court sustained the ruling of a district court declining to require a journalist to

divulge his confidential sources.* Responding to the argument that such testimony should, in light of Rule 26, always be compelled, this Court observed that:

> "We can see no justification for either a blanket rule covering all federal question cases, or for a partial rule of disclosure for all civil rights actions. It would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labeling one 'exceedingly important' and another less so, without specific directions from the Legislature. While we recognize that there are cases—few in number to be sure—where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony." (470 F.2d at 783)

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* It is significant that no similar exercise of discretion was involved in the District Court's opinion on appeal to this Court. Indeed, here the Court did not believe it was even entitled to rule in favor of Mr. Lando, in light of its legal conclusion that First Amendment cases had "nothing to do" with its rulings: had the Court, on the contrary, understood that such cases should have had much to do with its ruling, it might then have exercised its discretion correctly or incorrectly. Given the nature of the District Court's legal error, however, it could not—and did not—exercise such discretion at all.

And, rejecting the argument that the *Branzburg* v. *Hayes* ruling of the Supreme Court* required disclosure of confidential sources of journalists, this Court stated:

> "If, as Mr. Justice Powell noted in [*Branzburg*], instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in nondisclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.
>
> "It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case." (*Id.* at 785)

Other courts have subsequently followed the lead set by this Court in *Baker*. In the recent decision in *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 82 (E.D.N.Y. 1975), a confidential source was ordered not disclosed in a libel case since it was "relevant, but not essential to the resolution of the judicial controversy", notwithstanding

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* *Branzburg* rejected the argument of journalists who had witnessed crimes that they were not obliged to testify before grand juries with respect thereto. It also rejected, as this Court observed in *Baker*, an "absolute newsman's testimonial privilege" (470 F.2d at 783). *Branzburg*, however, did not reject the concept that in civil cases a qualified First Amendment privilege existed with respect to the non-disclosure of confidential sources and numerous later cases have held that such a privilege does exist. *See* Goodale, *Branzburg* v. *Hayes and the Developing Qualified Privilege for Newsmen*, 26 Hastings L.J. 709 (1975).

the language of Federal Rule 26. Similarly, in *Loadholtz* v. *Fields,* 389 F.Supp. 1299 (M.D. Fla. 1975)—another decision relying heavily on *Baker*—the Court, in a civil case, denied discovery sought of a journalist, notwithstanding the fact that the information sought did *not* come from a confidential source, in the absence of a "compelling" showing of need for the sought testimony. The application of the underlying theory of *Baker* that standard discovery rules can—and constitutionally must—accommodate First Amendment interests would, in and of itself, warrant remanding of this case to Judge Haight for further consideration consistent with First Amendment principles.

So too would application of the approach taken by the Court in *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). There, St. Louis Mayor Cervantes, in the course of discovery, sought disclosure of a confidential source of information; Time, Inc. cross-moved for summary judgment, which was granted. The Court of Appeals affirmed the ruling granting summary judgment, notwithstanding its conclusion (with which we differ) that "the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." (*Id.* at 992) It did so on the ground that:

> ". . . to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." (*Id.* at 993)*

* The approach taken by the *Cervantes* court is analogous to the long-standing practice of the Federal Communications Commission not even to investigate charges of "slanting" by broadcasters, absent extrinsic evidence of a decision by a broadcast

And it observed—in terms of direct applicability to this case—that:

> "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether they be anonymous or known. For only then can it be said that no genuine issue remains to be tried. Thus, if, in the course of pre-trial discovery, an allegedly libeled plaintiff uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity defense informant or the accuracy of his repo reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling. Similarly, where pre-trial discovery produces some factor which would support the

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licensee so to act. As phrased by the FCC in one of its leading rulings:

> "We stress that in this area of staging or distorting the news, we believe that the critical factor making Commission inquiry or investigation appropriate is the existence of material indication, in the form of extrinsic evidence, that a licensee has staged news events. Otherwise, the matter would again come down to a judgment as to what was presented, as against what should have been presented—a judgmental area for broadcast journalism which this Commission must eschew. For the Commission to investigate mere allegations, in the absence of a material indication of extrinsic evidence of staging or distortion, would clearly constitute a venture into a quagmire inappropriate for this Government agency."

Network Coverage of the Democratic National Convention, 16 F.C.C. 2d 650, 657-58 (1969); *see also The Selling of the Pentagon,* 30 F.C.C.2d 150 (1971); *Hunger in America,* 20 F.C.C.2d 143 (1969).

> conclusion that the defendant in fact entertained serious doubt as to the truth of the matters published, identification and examination of defense news sources seemingly would be in order, and traditional summary judgment doctrine would command pursuit of further discovery prior to adjudication of a summary judgment motion." (*Id.* at 994)

Here, of course, entirely aside from the District Court's failure to recognize the risks of inhibition of its decision upon First Amendment rights, the Court neither inquired "into the substance" of plaintiffs' libel allegations, nor required any "concrete demonstration" of need for the material.

Nor has there been, in the slightest, the kind of showing that the information sought by any of the questions at issue was essential, or that it went to the "core" or "heart" of the case, that has been held required in the context of demands for disclosure of confidential sources. *See, e.g., Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958); *Baker* v. *F&F Investment, supra; Carey* v. *Hume,* 492 F.2d 631 (D.C. Cir.), *cert. pet. dismissed,* 417 U.S. 938 (1974).

It is true that while the district court made no finding of essentiality as to any of the many questions at issue, it did conclude that the inquiries were relevant, since:

> ". . . if 'reckless disregard for truth' is a basis for liability, it necessarily follows that a plaintiff is entitled to discovery of the selective aspects of the editorial process; otherwise, he would never be able to prove (a) whether there has been 'disregard' of available and accurate source material; and (b) whether such 'disregard' could properly be characterized as 'reckless'." (JA 235a)

Yet "disregard" of available sources is precisely what is *not* at issue in a "reckless disregard" case.

Sullivan itself was a case in which The New York Times was held nonculpable, despite the availability in its own files of material contradicting the advertisement published by it. (376 U.S. at 287-88) In other cases, as well, the "disregard" of material "available" to a publication has been held an insufficient basis upon which liability could be imposed. *Time, Inc.* v. *Pape,* 401 U.S. 279, 289-90 (1971); *Oliver* v. *Village Voice, Inc.,* 417 F.Supp. 235, 238 (S.D.N.Y. 1976); *Buchanan* v. *Associated Press,* 398 F.Supp. 1196, 1203-04 (D.D.C. 1975); *Vandenburg* v. *Newsweek, Inc.,* 507 F.2d 1024 (5th Cir. 1975). And in *St. Amant* v. *Thompson,* 390 U.S. 727 (1968), the Supreme Court was explicit in holding that the essence of reckless disregard is not investigatory failure and that the only proper test is whether "the defendant in fact entertained serious doubts as to the truth of his publication." (*Id.* at 731) Questions as to why certain possible sources were not examined by a journalist as though a negligence standard were involved* thus not only intrude into the generally protected area of editorial judgment but are irrelevant to the libel case in which they are sought.

The recent ruling of this Court in *Hotchner* v. *Castillo-Puche,* No. 76-7479 (2d Cir., March 23, 1977) demonstrates anew the incorrectness of the District Court's emphasis in this case on the claims of negligence made by plaintiff. The facts of *Hotchner* as found by the district court** were as follows: plaintiff, who had been a friend of the late Ernest Hemingway, alleged he was libeled in the American edition

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* *See, e.g., Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 50 (1971).

** 404 F.Supp. 1041 (S.D.N.Y. 1975).

of a book by Jose Luis Castillo-Puche, another former Hemingway companion, which had been translated from the original Spanish and published by Doubleday and Company, Inc. (404 F.Supp. at 1043) In reviewing the record on a motion for summary judgment by Doubleday, the district court focused on the fact that a Doubleday editor had referred passages of the manuscript mentioning the plaintiff Hotchner to the publisher's Contracts Department for its " 'review from the standpoint of libel' ", and in so doing had attached a note which read in part:

> " '. . . the author of this book doesn't seem to like Hochner (sic) very much; . . . I don't really think anything [Castillo-Puche] says in the book about Hochner (sic) is libelous—it's probably just bitchy. But I thought you should look at the attached pages, which refer to Hochner (sic), and say whether you think it's okay to publish with this sort of sideswiping left in.' " (*Id.* at 1047)

In a responding memorandum, Doubleday's Assistant Contracts Manager expressed the following opinions about the manuscript in recommending that certain references to the plaintiff be " 'toned down or eliminated' ":

> " 'When looked at together these statements certainly ridicule Hotchner and impugn his reputation and character. As he seems to be an author who has worked in movies and TV, this could be a serious matter.
>
> " 'To make matters worse I doubt whether any of these statements can be substantiated in any way.' " (*Id.* at 1048)

The record in *Hotchner* also included a letter to Puche from the Doubleday editor requesting permission to " 'tone

down your remarks on [the plaintiff], rather slightly,'" because of advice from lawyers that

> "'. . . it's possible that he [the plaintiff] would think some of your remarks border on "malice" (in the legal sense) and that it would be professionally damaging to him, which in a legal sense could come under the legal grounds "damaging to his reputation and character."'" (*Id.* at 1048)

Subsequently, Puche communicated his approval of the proposed "toning down" and certain revisions were made by Doubleday's editor. (*Id.* at 1048-49) On the basis of these memoranda and letters, the District Court denied summary judgment, holding that were a jury to find that the book contained defamatory falsehoods despite the publisher's revisions, it could also find that Doubleday had been "culpably reckless" in publishing its book despite serious doubts as to its accuracy. (*Id.* at 1049)

In this Court's reversal of *Hotchner*, it observed that, notwithstanding all the evidence presented, "[m]ere negligence is not actionable" and that:

> "These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech. Such adequate safeguards

> for free speech inevitably result in reduced protection against printed statements which otherwise would be held libellous." (*Hotchner,* No. 76-7479, Slip op. at p. 2526)

As *Hotchner* well demonstrates, much of the material sought by plaintiff in this case is not even relevant, much less essential to its case.*

CONCLUSION

In *Baker, supra,* this Court concluded by observing that "[f]reedom of the press may be stifled by direct or, more subtly, by indirect restraints." (470 F.2d at 785) This case does not involve a "direct" attack on the press: the district court surely had no such intention and we have no hesitation in observing that its opinion is both lucid and thoughtful. What the case does involve, however, is a threat to the vigor and robustness of the press that is no less real than that presented in *Tornillo* itself.

We urge the Court to reverse the order of the district court and to remand to that court with directions to recon-

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* As *Hotchner* also suggests, the District Court's all-but-total reliance on this Court's decision in *Goldwater* v. *Ginzburg, supra,* is misplaced. *Goldwater* was not only decided long prior to this Court's rulings in both *Buckley* and *Hotchner;* it is also a case involving multiple abuses and falsifications by Ginzburg, including (1) fabricating statements (414 F.2d at 332), (2) adding phrases, sentences and paragraphs to what were misrepresented in the article as original letters received by the publisher (at 334), (3) omitting material including important qualifying paragraphs from reprinted letters without giving any indication of the omissions (at 334, 337), and (4) misrepresenting the source of letters reprinted (at 336). Absolutely nothing similar has even been suggested in this case.

sider the motion presented, giving due regard to the First Amendment considerations set forth by this Court.

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Dated: May 2, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

ANTHONY HERBERT, :

Plaintiff-Appellee, :

-against- :

BARRY LANDO, et al., :

Defendants, :

BARRY LANDO, MIKE WALLACE and CBS INC., :

Defendant-Appellants. :

- x

AFFIDAVIT OF SERVICE

Index No. 77-7142

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER K. DEMMERLE, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 2nd day of May, 1977, I served the annexed Brief and Joint Appendix upon:

Cohn, Glickstein, Lurie,
Ostrim & Lubell
1370 Avenue of the Americas
New York, New York 10019

by personally delivering and leaving two true and correct copies of the Brief and one copy of the Appendix at the offices of the above-mentioned attorneys.

Peter K. Demmerle
Peter K. Demmerle

Sworn to before me this
2nd day of May, 1977

Robert R. Cawthra Jr.
Notary Public

Notary Public, State of New York
No. 31-0625
Qualified in New York County
Commission Expires March 30, 1979